83-901

No. 83-_____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1983

PATRICK RUSSO, JR., *Petitioner,*

— *versus* —

UNITED STATES OF AMERICA,
Respondent.

PETITION

For a Writ of Certiorari

TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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- QUESTION PRESENTED -

May a defendant, merely by asking for a continuance, be estopped from complaining that the Speedy Trial Act was violated by an adjournment order which (a) took effect after all Speedy Trial time had run, and (b) postponed the trial for an unreasonably long period?

- SUBSIDIARY QUESTIONS PRESENTED -

A. Must not a reviewing court defer to the terms of an order which had fixed the inception date and duration of the period to be excluded from the statutory count?

B. Is not the Act violated by discounting a four week period as to which absolutely no justification for a delay is evident?

C. Are not the elements of equitable estoppel absent where one party has done nothing misleading and the other party has had equal knowledge of all material facts?

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK RUSSO, JR. v. UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Third Circuit

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Patrick Russo, Jr., hereby petitions that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment at Docket No. 82-5718.

- OPINIONS BELOW -

The Third Circuit entered a judgment order (34a) affirming Petitioner's conviction and sentence.[1/]

The district court's opinion, entered by the Honorable H. Lee Sarokin, is reported at 550 F. Supp. 1315 and is reproduced at 1a.

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1. Petitioner was sentenced to consecutive five year custodial terms after conviction for conspiring to and misapplying some $7000 in federally insured bank funds. Execution of the sentence has been stayed pending disposition of this Petition.

- JURISDICTION -

Trial court jurisdiction attached when Indictment No. 80-413 was filed in the District of New Jersey. It charged Patrick Russo, Jr., with one count of conspiring to misapply bank funds (18 U.S.C. § 371) and one count of misapplying bank funds (18 U.S.C. § 656).

The judgment of the court of appeals was entered on September 30, 1983. No petition for rehearing was filed. This Petition therefore will be timely if filed on or before November 29, 1983, the sixtieth day following entry of the court of appeals' judgment. Certiorari jurisdiction is established by 28 U.S.C. § 1254(1).

- STATUTE INVOLVED -

This case involves the Speedy Trial Act, 18 U.S.C. § 3161 et seq, pertinent portions of which are reproduced at 57a.

- STATEMENT OF THE CASE -

Petitioner asks the Court to construe for the first time the Speedy Trial Act, 18 U.S.C. §§ 3161 et seq. Although the salient facts arise in the context of a retrial, the question presented and any decision thereon would be equally applicable to any federal criminal proceeding.

Petitioner had been granted a new trial because of a faulty jury instruction. This earlier decision of the Third Circuit was entered without published opinion. That court's mandate issued on May 21, 1982. Thereupon, the 70 day statutory period for beginning any retrial, established by the Speedy Trial Act at 18 U.S.C. § 3161(e), commenced to run.

By letter of July 7, 1982[2/] (36a), which pointed out that the Act was applicable, Petitioner's trial counsel asked Chief Judge

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2. July 7, 1982 was the forty-seventh day of the speedy trial period.

Clarkson S. Fisher, who had presided at the original trial, not to commence the retrial prior to "a date to be set by the court in September 1982" (37a). In that letter, counsel enumerated his planned activities for the balance of July and for August, but did not identify any September commitments.

The next day, trial counsel filed and served an affirmation under penalty of perjury (40a). It restated his planned activities for July and August, and asserted that because of other obligations, "I have not had an opportunity to prepare for trial in the Russo case and will not be able to do so until the month of August" (41a ¶ 3). Counsel thereby indicated he would be ready and available for the retrial at any time in September.

In response to trial counsel's request, on July 13, 1982 Senior Judge Lawrence A. Whipple drafted and entered an Order (43a) on the authority of § 3161(h)(8). This Order

adjourned Russo's retrial until September 28, 1982 and specifically provided (45a):

> [T]he period of time from July 31, 1982 to September 28, 1982, that being 60 days, is excludable in computing the time within which the trial of this case must commence pursuant to the provisions of the Speedy Trial Act.

Evidently Judge Whipple drew the quoted terms, which were later to prove so nettlesome, from Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended (1979, with Aug. 1981 rev.) ("Guidelines"), published by the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States. These suggest that the "Starting Date" for an (h)(8) continuance be "[t]he day following the day that would otherwise have been the last day for commencement of trial," and the "Ending Date" be "[t]he date to which the trial . . . was continued." Guidelines, 61.

Since July 30 was the seventieth day after the appellate mandate had issued, and

therefore "would otherwise have been the last day for commencement of trial," Judge Whipple specified the "following" day, July 31, as the first excluded day. Having sua sponte selected September 28 as the trial date, Judge Whipple specified it -- "[t]he date to which the trial . . . was continued" -- as the last day of the excluded period.

Judge Whipple became ill and the trial was then reassigned to District Judge H. Lee Sarokin. When trial was called on September 29, [sic] 1982, Petitioner moved to dismiss the indictment for delay beyond the 70 day period allowed under the Act. He contended that Judge Whipple's Order took effect too late precisely because its inception date, July 31, 1982, was the seventy-first day not excludable under the Speedy Trial Act. Moreover, Petitioner complained that no justification whatsoever for excluding any portion of September appears in his request for a continuance or

elsewhere in the record.

Judge Sarokin reserved decision and proceeded to conduct the retrial. After Petitioner was found guilty,[3/] an opinion (1a) was issued which denied the Speedy Trial Act motion on alternative grounds.

1. The first basis for denial involved statutory construction. Each of two doubtful holdings was essential to the outcome.

A. Judge Sarokin held that as a matter of law, the excludable time must commence to run on the day of filing of an order granting a continuance. Therefore, he ruled, the speedy trial clock stopped on July 13, "notwithstanding the provision of the July 13 order purporting to exclude only a part of that period" (20a).

To justify this conclusion, the trial

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3. The question of Petitioner's guilt or innocence, as the district court observed (3a), is wholly irrelevant to his Speedy Trial Act claim. See United States v. MacDonald, 456 U.S. 1, 6 n.6 (1982).

judge reasoned that he was "merely following the statutory mandate by excluding the entire delay caused by the properly granted continuance" (21a). In other words, Judge Sarokin construed the Act to provide that upon the filing of any order delaying trial, regardless of its terms, the speedy trial clock is automatically stopped.

B. Building on that novel statutory interpretation, and without ever alluding to counsel's argument that in any event, there was no valid statutory basis for excluding any part of the month of September (46a, 52-53a), Judge Sarokin further held that the entire time "between July 13 and September 28 is excluded from the speedy trial calculation" (20a). Thus, an extra 17 days were added to the "60 days" specified in Judge Whipple's Order, without concern for whether the whole period of delay for this continuance was reasonably necessary.

Both of these holdings were essential to the ultimate finding of compliance with the Speedy Trial Act. First, as Judge Sarokin recognized, if July 31 is the inception date, the clock was stopped too late and the indictment had to be dismissed (17a). Second, assuming that the Speedy Trial clock was stopped on July 13, its fifty-third day, there remained only 17 more includable days within which to begin the trial. If the clock should have resumed running on September first, when all justification for a continuance ended, then time ran out on September 17. Moreover, if the excluded period is limited to no more than the sixty days which Judge Whipple intended, then no matter which sixty days are excluded, time ran out on September 28, the trial date selected by Judge Whipple.

Petitioner's retrial did not begin until September 28 had come and gone.[4/] It

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4. Note 4 is printed on next page.

therefore was delayed too long unless Judge Sarokin's holdings on the inception date and on the total duration of excludable delay were each free from error.

2. As an alternative holding, Judge Sarokin found an equitable estoppel. Specifically, Judge Sarokin opined that Petitioner "should be estopped from raising an objection to the timing of his trial when the delay was caused exclusively by his request for a continuance" (23-24a).

This conclusion was reached even though Petitioner had engaged in no fraud or

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4. Petitioner's jury was sworn on September 29. It then was sent home until October 4. The district court evidently assumed that once jeopardy had attached, the trial had commenced for purposes of the Speedy Trial Act. That construction of the Act, which is not at issue in this Petition, would permit a court to do an end run around the primary statutory purpose by swearing a jury within 70 days of arraignment and then adjourning to any later date. Cf. United States v. Cobb, 697 F.2d 38, 44 (2d Cir. 1982)(Act must not be circumvented by postponing hearing on motion longer than is reasonably necessary).

concealment. Both the district court and the prosecution had equal knowledge of the governing statute, the terms of Judge Whipple's Order, and all salient facts. Those facts had been spread on the record by trial counsel in early July, when more than twenty Speedy Trial Act days still remained.[5/]

The court of appeals upheld Judge Sarokin's rulings. In doing so, it gave his published Speedy Trial Act holdings precedential force throughout the Third Circuit.

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5. Should certiorari be granted, Petitioner will offer the further argument on the estoppel question that the district court plainly erred in finding that all delay was "exclusively" (23-24a) caused by him. In particular, the Order granting a continuance had been drafted by the court; the decision to "set down preemptorily" [sic] September 28 as the trial date (44a), and the further delay in actually commencing trial, were the result of independent intervening causes, namely, sua sponte judicial determinations.

- REASONS FOR GRANTING THE WRIT -

1. THE CIRCUITS ARE IN CONFLICT IN CONSTRUING THE SPEEDY TRIAL ACT

A. The courts below held that as a matter of statutory construction, the Speedy Trial Act clock is stopped upon filing of an order granting a subsection (h)(8) continuance, notwithstanding specification of a later clock-stopping date by the terms of the order. This holding creates a conflict between the circuits. It also makes a travesty of every (h)(8) order drafted in conformity with the Guidelines, supra.

To stop the clock, an adjournment order surely must be filed before all Speedy Trial time has run out, for the Act does not allow any nunc pro tunc (h)(8) exclusion. United States v. Carrasquillo, 667 F.2d 382, 386 (3d Cir. 1982); United States v. LaCruz, 441 F.Supp. 1261, 1265

(S.D.N.Y. 1977). Therefore every (h)(8) order drafted in conformity with the Guidelines will be filed while time remains and will specify that the excluded period shall begin on some later date, i.e., "the day following the day that would otherwise have been the last day for commencement of trial." Guidelines, 61.

The decision below does not merely reject the Guidelines. In doing so, it has the unseemly effect of giving every (h)(8) excluded period which was defined in accordance with the Guidelines an earlier effective date and a longer duration than the issuing judge had intended; it nullifies an essential term of the adjournment order.

Separate and apart from turning the widely-used Guidelines into a vehicle for undermining rather than implementing the Act, the decision below is in direct conflict with United States v. Campbell, 706 F.2d 1138 (11th Cir. 1983). The

Campbell Court specifically rejected both the Guidelines' (h)(8) calculation and any other ironclad rule, stating, "We think it preferable to permit the trial court to exercise its discretion, based on the particular facts of each case, and determine when an (h)(8) exclusion should begin and end" (706 F.2d at 1143). In Petitioner's case, Judge Whipple had exercised this discretion to determine when the exclusion should begin, but both Judge Sarokin and the Third Circuit later held that the Act "leave[s] no discretion in the trial judge to exclude any time less than the entire delay" (19a).

B. A further conflict arises as to whether all delay cognizable under § 3161(h) is to be excluded, or whether only those periods reasonably necessary for accomplishing a valid purpose are to be excluded from the Speedy Trial count. In

the resolution of this dispute lies the vitality of the Act, for under an automatic and total exclusion interpretation of subsection (h)(1)(F), the simple expedient of deferring resolution of any pretrial motion until trial would bring the Speedy Trial clock to a halt.

Petitioner's (h)(8) continuance had been granted solely to permit his counsel to adequately prepare for trial. On July 13, when the court set the trial date, it had been informed that counsel would undertake preparation during August and be ready at any time in September. Consequently, there was simply no reason cognizable under the Act for excluding more than the seven week period counsel needed to prepare. Nonetheless, the Third Circuit upheld an eleven week exclusion.

This holding cannot be harmonized with the Second Circuit's holding in United

States v. Cobb, 697 F.2d 38 (1982). The Cobb Court superimposed a reasonableness gloss upon a statutory provision, subsection (h)(1), which excludes "[a]ny period of . . . (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on . . . such motion." The Cobb Court held (697 F.2d at 45-46):

> A district judge may of course control the timing of such motions to fit the needs of a particular case. When that is done, however, the period from the court's deferral of the motion until its actual hearing or submission would not be automatically excludable under (F). Instead, if the trial judge should find that the period of delay is not reasonably necessary for processing the motion, then no excludable time would be allowed.

Thus, the Second Circuit holds that a statutory exclusion must be disregarded when the delay is not "reasonably necessary." This holding, which is premised upon furthering the purposes of the Act, conflicts directly with United States v.

Stafford, 697 F.2d 1368, 1372 (11th Cir. 1983) and with the decision below (19a). In both of the latter cases, the statutory term "[a]ny period of delay" was construed literally.

C. Yet another conflict emerges from the finding below of "wrongdoing" (24a) in that Petitioner, by his trial counsel, "waited until he believed the required time for trial under the statute had expired and then moved for dismissal" (2a). The Eleventh Circuit specifically has held that "[u]nder the Act, a defendant may if he wishes postpone asserting a Speedy Trial motion to dismiss until just before trial." United States v. Stafford, supra, 697 F.2d at 1373. Thus a litigation tactic which was condemned in the Third Circuit is commended in the Eleventh Circuit.

Moreover, this Court, construing the Speedy Trial Clause in Barker v. Wingo, 407

U.S. 514, 527 (1972), held that "[a] defendant has no duty to bring himself to trial." Consistent with Barker, a line of Second Circuit cases holds that "[r]esponsibility for Speedy Trial [Act] enforcement rests primarily on the district courts and on the government, not on the defendant." E.g., United States v. Didier, 542 F.2d 1182, 1187 (2d Cir. 1976). The Third Circuit is now in conflict with this holding.

The decision below relieves the government of all speedy trial responsibility once a defendant has requested and obtained an (h)(8) continuance. It concomitantly imposes upon the defendant an affirmative obligation to alert the court whenever, in granting such a continuance, the court has fallen into an error of its own making.

Not only does this aspect of the decision below conflict with holdings of

this Court and another circuit. It also seriously undermines our adversary system of justice. This is because it creates, as trial counsel warned (48-51a), an ethical double bind for the defendant's attorney. Specifically, it imposes upon defense counsel a duty to eliminate a valid defense from the case and thereby act against the client's best interest.

D. It is evident from the foregoing that the lower courts' approaches to the Speedy Trial Act are inconsistent and irreconcilable. Because the Act is designed to put into practice an important public policy, and because the Act affects the conduct of virtually every federal criminal proceeding, the writ should issue with a view toward obtaining uniformity in its interpretation.

2. THE ESTOPPEL HOLDING STRAYS FAR FROM THE USUAL COURSE OF JUSTICE

"The doctrine of equitable estoppel precludes a litigant from asserting a claim or defense which might otherwise be available to him against another party who has detrimentally altered her position in reliance on the former's misrepresentation or failure to disclose some material fact." Portmann v United States, 674 F.2d 1155, 1158 (7th Cir. 1982), citing 3 J. Pomeroy, Equity Jurisprudence § 803 at 189 (5th ed. 1941). No estoppel will lie where the party seeking its imposition timely knew or reasonably should have known of all salient facts. Audit Services, Inc. v. Rolfson, 641 F.2d 757, 762 (9th Cir. 1981); 3 J. Pomeroy, Equity Jurisprudence, supra, § 810 at 219.

The courts below have imposed a novel estoppel in commonplace circumstances.

Requests for a continuance because of a conflicting professional obligation or other reason are routinely made by trial attorneys. Such requests are granted, in whole or in part, almost as often as they are made. Upon making such a request, the courts below now hold, a federal criminal defendant "is estopped to assert" that the Speedy Trial Act was violated (33a).[6/]

This estoppel holding stretches that concept to new limits. Petitioner's attorney neither misrepresented nor concealed any material facts whatsoever. Both the prosecution and the district court at all times knew, or reasonably should have known, of the requirements of the Speedy Trial Act and of their application

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6. The lower courts eschewed a waiver analysis. Section 3162(a)(2) expressly provides for waiver through failure to move for sanctions before trial. Speedy Trial Act requirements cannot otherwise be waived by a defendant. United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1982).

to the facts of this case. No claim of detrimental reliance was advanced by the United States, and no reasonable basis for any such claim can be gleaned from the record.

In sum, the record cannot conceivably support the estoppel holding adopted in the alternative by the courts below.[7/] That holding is not just in conflict with the traditional requirements for an estoppel, exemplified by the cited authorities. It is also a holding which, if not checked, would judicially negate the remedial policies embodied in the Speedy Trial Act.

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7. Estoppel to complain of a violation of the Speedy Trial Act was first suggested in United States v. Cameron, 510 F.Supp. 645, 650 n.8 (D.Md. 1981). Aside from the decision below, the only Speedy Trial Act appellate decision which arguably invokes the doctrine is United States v. Bufalino, 683 F.2d 639, 646 (2d Cir. 1982), cert. denied, 103 S.Ct. 727 (1983) ("Bufalino, when faced with a government motion, had a duty to do more than stand by without taking a position and then . . . having the indictment dismissed on speedy trial grounds").

- CONCLUSION -

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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November 28, 1983.